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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DALE WILSON, on behalf of himself, all others similarly situated, and the general public,

Plaintiff,

v.

TE CONNECTIVITY NETWORKS, INC.; a Minnesota corporation; TYCO ELECTRONICS CORPORATION, a Pennsylvania corporation, and DOES 1-50, inclusive,

Defendants.

Case No.: 3:14-CV-4872-EDL

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: September 3, 2019
Time: 9:00 a.m.
Courtroom: Courtroom E

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TO THE COURT, TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

Please take notice that on September 3, 2019, at 9:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom E of the United States Courthouse, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Dale Wilson ("Plaintiff") will and hereby does move the Court for an order granting final approval of the STIPULATION OF CLASS ACTION SETTLEMENT AND RELEASE ("Agreement") reached with Defendants TE Connectivity Networks, Inc. and Tyco Electronics Corporation now TE Connectivity, Inc. (collectively "Defendants"), a true and correct copy of which is filed as ECF No. 136-1. The addendum to the Agreement is filed as ECF No. 140-2. Specifically, Plaintiff moves for an order to:

1. grant approval of the terms of the Agreement as fair, reasonable and adequate under Rule 23(e) of the Federal Rules of Civil Procedure, including the amount of the settlement; the amount of distributions to class members; and the amounts allocated to the enhancement payment and attorney's fees and costs;

2. certify for settlement purposes the settlement class described in the Agreement as follows: "All current and former non-exempt employees of Tyco employed in the State of California between October 1, 2010 through and including May 15, 2017 who had a half hour deducted for a meal period from their recorded hours as part of an auto-deduct policy."

3. appoint Plaintiff as representative for the Settlement Class;

4. appoint Setareh Law Group and Marlin & Saltzman as counsel for the Settlement Class;

5. enter judgment on the terms specified in the Stipulation and approved by the Court.

Plaintiff's motion is based on this Notice, the following Memorandum of Points and Authorities, the Supplemental Declaration of Jarod Salinas, all other pleadings and papers on file in this action, and any oral argument or other matter that may be considered by the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Settlement Fund here provides $4,960,000 for 1,300 class members. This excellent settlement result was achieved after four years of hard fought litigation, including multiple remand motions, multiple discovery disputes decided by the court, the depositions of parties and many class members, many interviews with class members, multiple briefs concerning Plaintiff Dale Wilson's class certification motion, briefing regarding Defendants' Rule 23(f) petition, and two mediation sessions. The case was extremely risky, considering Defendants' defenses and the fact that in a separate lawsuit in the Northern District Judge Patel granted Defendants' motion for summary judgment where one of Defendants' employees alleged that he did not receive meal breaks. *Villa v. Tyco Electronics Corp., et al*, Case No. C 10-00516 MHP (Jan. 7, 2011).

This is a putative wage and hour class action on behalf of any and all non-exempt employees of Defendants TE Connectivity Networks, Inc. and Tyco Electronics Corporation now TE Connectivity, Inc. (collectively "Defendants") employed in California who had a half hour deducted for a meal period from their recorded hours as part of an auto-deduct policy, during the Class Period (between October 1, 2010 through and including May 15, 2017). The Settlement (which the Court granted preliminary approval of on December 26, 2018) provides for a total Settlement Fund of $4,960,000. Class members will not have to make a claim but instead will be mailed checks directly. No money will revert to the Defendants, instead any amount from uncashed checks will be tendered to the California State Controller's Office, Unclaimed Property Division. The highest Settlement Share to be paid is approximately $4,719.68 and the average Settlement Share to be paid is approximately $2,450.87. (Supplemental Declaration of Jarrod Salinas ¶ 8.) The Settlement Fund is approximately 68.36% of the estimated exposure.

Plaintiff achieved an excellent result for the class given that the operative claims are narrowly defined and this case was vigorously defended by experienced and skilled defense counsel. The Settlement was the result of a thorough factual and legal analyses and arms-length negotiations. The Agreement represents a fair, adequate and reasonable compromise of disputed wage claims. Indeed, Plaintiff obtained an excellent result for class members in the face of formidable opposition. As

explained in Plaintiff's Motion for Attorney Fees and Costs filed as ECF No. 147, the Agreement's attorneys' fees and costs provisions are reasonable and consistent with Ninth Circuit precedent.

Through this Motion, Plaintiff requests certification of a settlement Class pursuant to Federal Rule of Civil Procedure 23 and final approval of the proposed class action settlement.

II. THE NOTICE PROCESS WAS SUCCESSFULLY COMPLETED AFTER PRELIMINARY APPROVAL

The Parties have fulfilled the class notice procedures set forth in the Court's Preliminary Approval Order and the Class Members' responses have been overwhelmingly positive. On January 9, 2019, Defendants provided the claims administrator, Simpluris, Inc. ("Claims Administrator" or "Simpluris"), with a list of Class Members. (ECF No. 147-3: Declaration of Jarrod Salinas ("Salinas Decl.") ¶ 5.) Simpluris updating all the addresses through the National Change of Address System. (ECF No. 147-3: Salinas Decl., ¶ 6.) Simpluris sent individual notices to 1,278 Class Members on January 3, 2019. (ECF No. 147-3: Salinas Decl., ¶ 7.)

On March 28, 2019, Counsel for Defendant provided Simpluris with 22 additional Class Members. (Supplemental Salinas Decl., ¶ 2.) On April 18, 2019, after updating the mailing addresses through the NCOA, Notice Packets were mailed via First Class Mail to the 22 additional Class Members, providing them until June 3, 2019 (45 days) to respond. (Supplemental Salinas Decl., ¶ 3.) Simpluris has been able to locate 60 updated addresses via skip trace, and Simpluris promptly mailed Notice Packets to those updated addresses. (Supplemental Salinas Decl., ¶ 4.) Ultimately, 9 Class Member's Notice were undeliverable because Simpluris was unable to locate a current address. (Supplemental Salinas Decl., ¶ 4.) As of this date, Simpluris has accepted 6 valid disputes, and there are no pending disputes. (Supplemental Salinas Decl., ¶ 6.) Class Members were also provided access to information about the settlement in this matter through a dedicated website. (ECF No. 147-3: Salinas Decl., ¶ 9.) The best Notice practicable was provided.

No Class Members have objected to the settlement. (Supplemental Salinas Decl., ¶ 7.) ***No*** Class Members have requested exclusion. (Supplemental Salinas Decl., ¶ 5.) Simpluris' total costs are estimated to be $26,035, far less than the $45,000 amount allocated in the Settlement Agreement. (Supplemental Salinas Decl., ¶ 9.) (Agreement, ¶ 56.)

III. BACKGROUND

A. Complaint

Plaintiff was employed by Tyco as a non-exempt employee in California. On October 1, 2014, Plaintiff filed a class action lawsuit against Defendants in the Superior Court for the State of California, County of San Mateo, Case No. CIV530714 alleging causes of action for: (1) Failure to Provide Meal Periods (Lab. Code §§ 204, 223, 226.7, 512, and 1198); (2) Failure to Provide Rest Periods (Lab. Code §§ 204, 223, 226.7, and 1198); (3) Failure to Pay Hourly Wages (Lab. Code §§ 223, 510, 1194, 1194.2, 1197, 1997.1, and 1198); (4) Failure to Provide Accurate Written Wage Statements (Lab. Code § 226(a)); (5) Failure to Timely Pay All Final Wages (Lab. Code §§ 201-203); (6) Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*); and (7) Civil Penalties (Lab. Code §§ 2698, *et seq.*). (ECF No. 1, Exh. A.).

B. Removal

On November 3, 2014, Defendants removed the action to the Northern District of California under the Class Action Fairness Act ("CAFA"). (ECF No. 1.)

On January 22, 2015, Plaintiff filed a motion to remand the case to state court arguing that Defendants had not proved by a preponderance of the evidence that the amount in controversy exceeded $5,000,000 as required by the CAFA. (ECF Nos. 17.) On March 26, 2015, the Court denied Plaintiff's motion to remand without prejudice, noting that discovery might reveal that there is a good faith reason to remand this case. (ECF No. 31.)

C. Extensive Discovery Conducted

Plaintiff and Defendants both served and responded to several sets of written discovery responses.

Defendants deposed Plaintiff Dale Wilson on October 15, 2015. (ECF No. 147.1: Declaration of Shaun Setareh ("Setareh Decl.") ¶ 10.)

On January 19, 2016, Plaintiff filed a motion to compel documents and further discovery responses from Defendants. (ECF No. 45.) On May 31, 2016, a hearing on Plaintiff's motion to compel took place, at which time the Parties informed the Court that they had resolved nearly all disputed issues through meet and confers. During the hearing,

the Parties reached an agreement on additional disputed issues on the record, and this agreement was memorialized in the Court's June 6, 2016 Order. (ECF No. 60). This Order ordered Defendants to produce a class list with employee ID numbers, dates of employment, hourly rate, and supplement their responses to three interrogatories. (ECF No. 60.)

After receiving the class list information from Defendants, Plaintiff interviewed putative class members to investigate their experiences as Tyco's employees. Plaintiff's counsel spoke to a number of class members, and received declarations from a number of class members. (ECF No. 147.1: Setareh Decl. ¶ 12.)

Plaintiff deposed Lynne Pereira as an individual and as Defendant's Person Most Knowledgeable on August 23, 2016. (ECF No. 147.1: Setareh Decl. ¶ 13.)

D. Renewed Motion to Remand

On August 9, 2016, Plaintiff filed a renewed Motion to Remand on the basis that discovery allegedly revealed that the amount in controversy was not met. (ECF No. 66.) This motion was denied on October 3, 2016. (ECF No. 76.)

E. Motion for Class Certification

On October 11, 2016, Plaintiff moved for class certification. Plaintiff's motion sought to certify three proposed subclasses: (1) meal break class; (2) rest break class; and (3) auto-deduct class. (ECF No. 77.) In support of his Motion for Class Certification, Plaintiff provided declarations from 11 class members. Defendants deposed 5 of the class members. (ECF No. 147.1: Setareh Decl. ¶ 16.) Defendants' filed an opposition to Plaintiff's Motion for Class Certification and Plaintiff filed a Reply. (ECF Nos. 78-85.)

The Parties argued their positions regarding class certification before the court on January 17, 2017. The parties submitted supplemental briefing regarding the contents of the declarations provided in the Class certification briefing. (ECF No. 95.)

On February 9, 2017, the Court granted in part Plaintiff's motion for class certification. (ECF No. 96.) The Court denied Plaintiff's motion for class certification as to the meal and rest break classes because individual inquiries predominated. The Court carefully weighed the evidence regarding class certification, and addressed cases that both

supported and weakened Plaintiff's class certification arguments. Defendants pointed to a separate lawsuit where one of Defendants' employees alleged that he did not receive meal and rest breaks. *Villa v. Tyco Electronics Corp., et al,* Case No. C 10-00516 MHP (Jan. 7, 2011). In *Villa*, Judge Patel granted Defendants' motion for summary judgment and found that "Plaintiff's testimony establishes that defendant did not deny him any required meal or rest breaks." *Id*. The Court's February 9, 2017 order found class certification to be "a close question," when reviewing cases provided by Defendants in opposition to class certification. (ECF No. 96, page 17.) The Court ultimately granted the motion for class certification in part as to Plaintiff's auto-deduct class. The Court directed the parties to address via supplemental briefing the scope of the auto-deduct class, or file a motion for additional discovery.

On February 23, 2017, Plaintiff filed a motion to take additional discovery regarding the scope of the auto-deduct class. (ECF No. 99.) Defendants' opposed the motion to take additional discovery and Plaintiff filed a reply. (ECF Nos. 100-102.) The parties appeared for oral argument on April 4, 2017. Per the Court's instructions, the parties further met and conferred before submitting proposed orders regarding the discovery motion. On April 12, 2017, the Court ordered Defendant to produce additional documents and information regarding the auto-deduct class, such as information regarding whether Tyco maintains photographs/videos of the production lines, declarations regarding putative class members' recording and taking of meal breaks and a spreadsheet listing by employee ID number and job title listing the employees in each department to enable a sampling. (ECF No. 110.) Pursuant to that order, Defendant provided additional discovery information and documents, including a list of employees to select a sampling from. Also pursuant to that Order, Plaintiff deposed Ernie Blazic and Robert Artega. (ECF No. 147.1: Setareh Decl. ¶ 19.)

On September 29, 2017, Plaintiff filed his supplemental briefing regarding class certification. (ECF No. 115.) On October 20, 2017, Defendants filed their opposition regarding the supplemental briefing. (ECF No. 116.) On November 3, 2017, Plaintiff filed his reply regarding supplemental briefing. (ECF No. 115.)

On January 25, 2018, following receipt of this supplemental briefing, the Court certified the auto-deduct class. (ECF No. 118.)

F. Appeal of Class Certification Order

On February 14, 2018, Defendants filed a Rule 23(f) petition with the Ninth Circuit seeking permission to appeal the class certification order with respect to the auto-deduct class. (ECF No. 119.) Plaintiff filed his opposition to Defendants' petition to appeal on February 20, 2018. Defendants filed their reply on March 1, 2018. Defendants withdrew their petition for permission to appeal on May 11, 2018, when the parties had agreed to settle the case. (ECF No. 147.1: Setareh Decl. ¶ 22.)

G. Settlement Reached With the Aid of Mediator

Through the Litigation, Plaintiff and the Class sought damages, wages, penalties, restitution, disgorgement, punitive and exemplary damages, costs, interest and attorneys' fees. Defendants deny the allegations asserted in the Litigation and asserts that they have no liability for any of Plaintiff's or the Class Members' claims under any statute, wage order, rule, regulation, common law, or equitable theory.

The Parties participated in a Court-ordered mediation on December 15, 2015, but made no significant progress. (ECF No. 147.1: Setareh Decl. ¶ 23.) On April 26, 2018, Plaintiff and Defendants engaged in arm's length negotiations, including a mediation session facilitated by mediator Steven Rottman, who has extensive experience in labor and employment litigation. Both parties prepared detailed mediation briefs and retained experts to develop models for estimating Defendants' potential exposure in this action on a class-wide basis under various assumptions. The mediation included discussion and examination of the Parties' respective positions on the legal and factual issues raised in the Litigation. (ECF No. 147.1: Setareh Decl. ¶ 25.) During the mediation session, the parties negotiated extensively at arm's length without reaching a resolution. But, with the mediator's assistance, the parties continued engaging in their arm's length negotiations and ultimately agreed to the Agreement now before this Court. After mediation and settlement discussions, which included arms' length negotiations, the Parties agreed to settle this matter for the Settlement Sum of $4,960,000. (ECF No. 147.1:

Setareh Decl. ¶¶ 25-26.)

Plaintiff and Class Counsel concluded, after taking into account the sharply disputed factual and legal issues involved in this Litigation, the risks attending further prosecution, the discovery and investigation conducted to date, and the substantial benefits received and to be received pursuant to the compromise and settlement of the Litigation, that settlement on the terms discussed herein is in the best interests of Plaintiff and the Class. (ECF No. 147.1: Setareh Decl., at ¶ 28.) Plaintiff and Class Counsel are mindful of the problems of proof they face, many of which were discussed during the mediation. As such, Class Counsel believes that the Settlement reached is fair to the Class and confers substantial benefits on the Class, providing all Class Members with recoveries in the near term. Based on their evaluation, Class Counsel determined that the settlement set forth in the Agreement discussed herein is in the best interest of the Class. (*Id.*) The Agreement, if approved by the Court, will resolve the claims of the settlement Class. The Class Representative will also execute a general release of all claims.

IV. SUMMARY OF SETTLEMENT TERMS

The full terms of the settlement are set forth in the Agreement and addendum. The primary material terms are as follows:

(a) The Settlement Class is: All current and former non-exempt employees of Tyco employed in the State of California between October 1, 2010 through and including May 15, 2017 who had a half hour deducted for a meal period from their recorded hours as part of an auto-deduct policy. (Agreement ¶ 6.)

(b) The total class action settlement amount is $4,960,000, inclusive of the following: (a) Payments to Participating Class Members; (b) Class Counsel's attorneys' fees and litigation costs, (c) Any Administration Costs, (d) Any Enhancement Award to the Plaintiff, and (e) The payment to the California LWDA. (Agreement, ¶¶ 30, 56.)

(c) Each Class Member who does not opt out will be paid his/her share of the Net Settlement Sum, subject to certain taxes and withholdings. (Agreement, ¶ 60.)

(d) Class Counsel will not seek an amount greater than $1,653,333.30 for Attorney's Fees. (Agreement, ¶ 56.)

(e) Class Counsel will not seek an amount greater than $50,000 for Costs. (Agreement, ¶ 56.)

(f) Settlement Administration costs are estimated at $45,000 and will be paid out of the Settlement. (Agreement, ¶ 56.)

(g) Plaintiff will seek a Class Representative enhancement award of $7,000. (Agreement, ¶ 56.)

(h) The sum of $37,500 shall be paid to the Labor and Workforce Development Agency to resolve claims arising under PAGA. (Agreement, ¶ 56.)

(i) If checks remain uncashed after 180 days, the amount of the Individual Settlement Award shall be tendered to the California State Controller's Office, Unclaimed Property Division. (Agreement, ¶ 56.)

A true and correct copy of the Settlement Agreement is filed as ECF No. 136-1. The addendum to the Settlement Agreement is filed as ECF No. 140-2.

V. THE SETTLEMENT MERITS FINAL APPROVAL

The law favors settlement, particularly in class actions and other complex cases, where substantial resources can be conserved by avoiding the time, cost, and the rigors of formal litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). These concerns apply in a case such as this, where allegedly wrongful practices potentially affected approximately 1,300 employees, in relatively small amounts.

Any settlement of class litigation must be reviewed and approved by the court. This is done in two steps: (1) an early (preliminary) review by the court, and (2) a final review after notice has been distributed to the class for their comment or objections. The *Manual for Complex Litigation Second* states at § 30.44 (1985):

> A two-step process is followed when considering class settlements … if the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that notice be given to the class members of a formal

> fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.

When parties reach a settlement agreement prior to class certification, "courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Acosta v. Trans Union LLC*, 243 F.R.D. 377, 383 (C.D. Cal. 2007).

"The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is '***within the range of possible approval***.' This hearing is not a fairness hearing; its purpose, rather is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (6th Cir. 1980) [quoting Manual for Complex Litigation s 1.46, at 53-55 (West 1977)] (emphasis added). "[T]he district court must assess whether a class exists," *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003), *i.e.*, whether the lawsuit qualifies as a class action under Rule 23. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (reviewing settlement to ensure compliance with requirements of Rule 23(a) and Rule 23(b)(3)).

At the second stage of the approval process, after class members have had an opportunity to object to the settlement, the court makes a final determination whether the settlement is "fair, reasonable and adequate" under Rule 23(e). *Armstrong*, 616 F.2d at 314; *see Staton*, 327 F.3d at 952; *see also* Rule 23(e)(C)(1), which provides that a court may finally approve a settlement of a class action if it finds after a hearing that the settlement is "fair, reasonable, and adequate" and Rule 23(e)(C)(4), which provides that any class member may object to a proposed settlement.

A. <u>This Court Already Certified This Class</u>

Under the first step of the final settlement approval analysis, the Court is obliged to make an initial determination that the Settlement Class meets the class certification requirements of Rule 23. This requires that all four Rule 23(a) prerequisites and that at least one of the three Rule 23(b) requirements be met. Plaintiff need only make a "prima facie showing" of the requirements under Rule 23. *See* Schwarzer, *et al.*, *Cal. Prac. Guide: Fed. Civ. Proc. Before Trial*, § 10:573 (Rutter Group 2006). In determining the propriety of class certification, a court may not delve into the underlying merits. The fundamental question "is

not whether . . . plaintiff [has] stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

This Court already certified the auto-deduction class on January 25, 2018. (ECF No. 118.)

B. The Settlement Falls Squarely Within the Range of Reasonableness and Should Be Finally Approved

No single criterion is dispositive for whether a class settlement meets the requirements of Rule 23(e). The Ninth Circuit has directed district courts to consider a variety of factors without providing an "exhaustive list" or suggesting which factors are most important. *See Staton, supra*, 327 F.3d at 959. "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Due to the impossibility of predicting any litigation result with certainty, a district court's evaluation of a settlement essentially amounts to "nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Id.* at 625 (internal citations omitted).

There is a presumption that the negotiations were conducted in good faith. Newberg, §11.51; *Pridd v. Edelman*, 883 F.2d 438, 447 (6th Circuit 1989); *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Hammon v. Barry*, 752 F. Supp. 1087 (D.D.C. 1990); *In re Armored Car Anti-Trust Litigation*, 472 F. Supp. 1357 (N.D. GA 1979); *Sommers v. Abraham Lincoln Federal Savings & Loan Association*, 79 F.R.D. 571 (E.D. PA 1978). The fact that settlement results from arms-length negotiations following "relevant discovery" creates "a presumption that the agreement is fair." *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, *5 (N.D. Cal. 1997); *See In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (settlement approved where informal discovery gave the parties a clear view of the strength and weaknesses of their cases).

Here, the Parties reached a non-collusive settlement after extensive motion work, and the assistance of an experienced mediator. The Parties participated in Court-ordered mediation early in the case but made no significant progress. On April 26, 2018, the parties mediated this matter with the assistance of mediator Steven Rottman who is an experienced employment class action mediator. Prior to the mediation, Defendants produced time and payroll data for a sampling of the putative class which Plaintiff's expert analyzed. (ECF No. 147.1: Setareh Decl. ¶ 15). Plaintiff's counsel also interviewed a number of putative class members about their experiences with Defendants, and gathered a number of signed declarations from class members. (ECF No. 147.1: Setareh Decl. ¶ 15). After the April 26, 2018 mediation, the Parties engaged in several telephonic conversations with Mr. Rottman, which culminated in the Parties' agreeing to settle this matter. The Agreement falls well within the range of reasonable outcomes and merits approval under Rule 23(e). (ECF No. 147.1: Setareh Decl., ¶ 26.)

1. The Value of the Settlement to Class Members Is Fair, Reasonable and Adequate

a. The Settlement was Arrived at After Extensive Discovery and Investigation

The Parties reached a Settlement in good faith after negotiating at arm's length with a professional mediator. (ECF No. 147.1: Setareh Decl., ¶ 15.) Settlement occurred only after extensive discovery commenced. That discovery included multiple sets of interrogatories and comprehensive requests for production to each party. The Parties produced documents in response to discovery (followed by still more data about class composition requested and produced prior to mediation).

After receiving the class list from Defendants, Plaintiff interviewed putative class members to investigate their experiences as Tyco's employees. Plaintiff's counsel spoke to a number of class members, and received declarations from a number of class members. (ECF No. 147.1: Setareh Decl. ¶ 15.)

Plaintiff was deposed on October 15, 2015 and Plaintiff deposed Lynne Pereira as an individual and as Defendant's Person Most Knowledgeable on August 23, 2016. (ECF No.

147.1: Setareh Decl. ¶¶ 10, 13.)

On October 11, 2016, Plaintiff moved for class certification. In support of his Motion for Class Certification, Plaintiff provided declarations from 11 class members. Defendants deposed 5 of the class members. (ECF No. 147.1: Setareh Decl. ¶ 16.) Defendants filed an opposition to Plaintiff's Motion for Class Certification and Plaintiff filed a Reply. (ECF Nos. 78-85.)

The information produced in discovery, briefing the motion for class certification, the discovery obtained through Plaintiff's motion to compel including the class list, interviews with class members, and the additional, detailed data about class composition produced for mediation, were sufficient to permit Plaintiff's counsel to adequately evaluate the settlement. (ECF No. 147.1: Setareh Decl., ¶ 34.) And, notably, approval of a class action settlement does not require that discovery be exhaustive. *See, e.g., In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (settlement approved where informal discovery gave the parties a clear view of the strength and weaknesses of their cases). The fact that settlement results from arm's length negotiations following "relevant discovery" creates "a presumption that the agreement is fair." *Linney v. Cellular Alaska Partnership*, 1997 WL 450064, at *5 (N.D. Cal. 1997).

b. An Excellent Result Was Achieved on Behalf of the Class

With respect to the claims asserted on behalf of the settlement Class in this case, there are significant risks that support the reduced compromise amount. In its February 9, 2017 order, the Court recognized that there are cases both supporting and opposing class certification. (ECF No. 96.) The Court in fact denied Plaintiff's motion for class certification as to the meal and rest break classes because individual inquiries predominated. The Court carefully weighed the evidence regarding class certification, and addressed cases that both supported and weakened Plaintiff's class certification arguments. Defendants pointed to a separate lawsuit where one of Defendants' employees alleged that he did not receive meal and rest breaks. *Villa v. Tyco Electronics Corp., et al*, Case No. C 10-00516 MHP (Jan. 7, 2011). In *Villa v. Tyco*, Judge Patel granted Defendants' motion for summary judgment and found that "Plaintiff's testimony establishes that defendant did not deny him any required meal or rest breaks." *Id.* The Court's February 9, 2017 order found class certification to be "a close question," when reviewing

cases provided by Defendants in opposition to class certification. (ECF No. 96, page 17.)

Courts have found that auto-deduct classes do not satisfy predominance for class certification purposes. *See Villa v. United Site Servs. Of California, Inc*., No. 5:12-CV-00318-LHK, 2012 WL 5503550 (N.D. Cal. Nov. 13, 2012; *Blackwell v. SkyWest Airlines, Inc*., 245 F.R.D. 453, 461 (S.D. Cal. 2007).

Although the Court granted class certification, prevailing at trial would require further risky litigation and likely involve an expensive battle of the experts. Defendants would certainly appeal any verdict favorable to the class, resulting in further delay and the risk that a favorable verdict would be overturned on appeal.

When facing an uncertain resolution of the claims in this Action, settlement is all the more reasonable. Indeed, the Maximum Settlement Amount will provide Settlement Class members with real and timely payments as opposed to the largely speculative awards that may or may not otherwise be obtained based on the various litigation risks going forward should the proposed Settlement not be approved. (ECF No. 147.1: Setareh Decl., ¶ 28.) Continued litigation of this lawsuit presented Plaintiff and Defendants with substantial legal risks that were (and continue to be) very difficult to assess.

In light of the uncertainties of protracted litigation, the settlement amount reflects a fair and reasonable recovery for the settlement Class Members. (ECF No. 147.1: Setareh Decl. ¶¶ 32-39.) The settlement amount is, of course, a compromise figure. (*Id*. ¶ 40.) By necessity it took into account risks related to liability, damages, and all the defenses asserted by the Defendants. (*Id*.) Moreover, each settlement Class Member will be given the opportunity to opt out of the Settlement, allowing those who feel they have claims that are greater than the benefits they can receive under this Settlement, to pursue their own claims. (*Id*.) With 1,300 class members in the class, the gross recovery for each class member is projected to exceed $3,815 per employee ($4,960,000 / 1,300 = $3,815.38). The highest Settlement Share to be paid is approximately $4,719.68 and the average Settlement Share to be paid is approximately $2,450.87. (Supplemental Declaration of Jarrod Salinas ¶ 8.) The value of this amount reflects a fair compromise well within the range of reasonableness. Given the strong case that Defendants could bring to bear to challenge liability, this is not an inconsequential sum in these

challenging economic times. And, confirming the fundamental fairness of the settlement, each Class Member will be compensated based on the number of workweeks they worked during the class period. (ECF No. 147.1: Setareh Decl., ¶ 40.)

After analyzing the claims in this matter, Plaintiff has concluded that the value of this Settlement is fair, adequate and reasonable. Based on information provided by Defendants during the litigation, as well as other investigation, Plaintiff's counsel estimates that the damages at issue for the meal break claims are $7,255,321.84. (ECF No. 147.1: Setareh Decl. ¶ 41.) Thus, the Maximum Settlement Amount of $4,960,000 represents 68.36% of the damages the class could reasonably have expected to recover at trial. (*Id.*) While Plaintiff would certainly have preferred to recover more (and Defendants would have preferred to pay less), this outcome is favorable considering the risks of further litigation. (*Id.*) On that basis, it would be unwise to pass up this settlement opportunity.

How class members respond to a class action settlement is typically addressed in concert with courts' assessments of a settlement's overall benefit to class members. *See generally, Vizcaino, supra.* State and federal courts alike take the measure of a settlement's "fairness" with reference to the class members' reaction, and specifically the extent to which class members object, and through their objections imply a settlement's unfairness. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1152-53 (2000) (only nine objectors from a class of 5454 was an "overwhelmingly positive" fact that supported approval of the settlement); *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978) (16 objectors out of 5400 strongest evidence of no dissatisfaction with settlement among class members); *American Eagle Ins. Co. v. King Resources Co.*, 556 F.2d 471, 478 (10th Cir. 1977) (only one objector "of striking significance and import"). There have been no objections or requests for exclusion. (Supplemental Declaration of Jarod Salinas ¶¶ 5, 7.) Here, the absence of objections and requests for exclusion is an excellent indicator of the quality of the settlement, particularly given the class size.

c. Class Counsel Assumed Substantial Risk

The novelty and challenges presented by a class action, as well as the corresponding risk that the class members and class counsel will be paid no recovery or fee, is properly evaluated in connection with a fee motion. *See Serrano*, 20 Cal. 3d at 49; *accord Vizcaino*, 290 F.3d at 1050-51 (multiplier

applied to lodestar cross-check reflects risk of non-recovery). Ninth Circuit and California state courts regard circumstances in which class counsel's work is wholly contingent as a factor weighing in favor of approving a negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001).

In its February 9, 2017 order, the Court recognized that there are cases both supporting and opposing class certification. (ECF No. 96.) The Court in fact denied Plaintiff's motion for class certification as to the meal and rest break classes because individual inquiries predominated. The Court carefully weighed the evidence regarding class certification, and addressed cases that both supported and weakened Plaintiff's class certification arguments. Defendants pointed to a separate lawsuit where one of Defendants' employees alleged that he did not receive meal and rest breaks. *Villa v. Tyco Electronics Corp., et al*, Case No. C 10-00516 MHP (Jan. 7, 2011). In *Villa v. Tyco*, Judge Patel granted Defendants' motion for summary judgment and found that "Plaintiff's testimony establishes that defendant did not deny him any required meal or rest breaks." (*Id*.) The Court's February 9, 2017 order found class certification to be "a close question," when reviewing cases provided by Defendants in opposition to class certification. (ECF No. 96, page 17.)

Courts have found that auto-deduct classes do not satisfy predominance for class certification purposes. *See Villa v. United Site Servs. Of California, Inc*., No. 5:12-CV-00318-LHK, 2012 WL 5503550 (N.D. Cal. Nov. 13, 2012; *Blackwell v. SkyWest Airlines, Inc*., 245 F.R.D. 453, 461 (S.D. Cal. 2007). Class Counsel nevertheless faced that risk and an excellent result was obtained.

2. The Agreed Upon Fees and Costs Are Reasonable

While a separate Motion addresses Plaintiff's requests for attorney's fees, costs, and enhancement award, Plaintiff briefly addresses the reasonableness of the amounts below. (ECF No. 147.)

a. Plaintiff seeks reasonable fees and costs

The compensation sought for Plaintiff's counsel is also fair and reasonable. The Ninth Circuit has directed that, to determine what constitutes a fair and reasonable percentage of the settlement for purposes of calculating common fund attorneys' fees, the courts should begin with a "benchmark" percentage of the

total fund. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1047 (9th Cir. 2002); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990). The percentage can be adjusted upwards where the risks overcome, the benefits obtained and the work necessary to achieve those results supports such an adjustment of the benchmark. Here, the gross settlement fund obtained through the efforts of Class Counsel is $4,960,000. Class Counsel has agreed to request no more than $1,653,333.30 in fees from the gross settlement amount, or one-third of the gross settlement amount. Class Counsel has agreed to request no more than $50,000 in costs. Plaintiff actually requests only $42,694.03 in costs. The multiplier necessary to reach the total requested compensation is approximately 2.38, a multiplier below the multipliers of 3 or more that are routinely approved in class settlements. The result achieved by Class Counsel merits the requested fees and costs.

b. The Enhancement Award Is Reasonable

Enhancement awards serve to reward the named plaintiff for the time and effort expended on behalf of the class, and for exposing herself to the significant risks of litigation. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001); *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997). In *Coca-Cola*, for example, the court approved incentive awards of $300,000 to each named plaintiff in recognition of the services they provided to the class by responding to discovery, participating in the mediation process and taking the risk of stepping forward on behalf of the class. *Coca-Cola*, 200 F.R.D. at 694; *see also Van Vranken v. Atl. Richfield Co*., 901 F. Supp. 294, 300 (N.D. Cal. 1995) (approving $50,000 participation award).

Here, Plaintiff's counsel requests that the Court grant Plaintiff an enhancement award of $7,000. The amount of the enhancement award requested for Plaintiff reasonable given the risks undertaken by Plaintiff. Taking the risk of filing a lawsuit against an employer deserves reward, especially in light of the settlement achieved by Plaintiff. Additionally, Plaintiff was actively involved in the litigation and settlement negotiations of this Action. Plaintiff assisted with discovery and was deposed. Plaintiff worked diligently with counsel to prepare the action, traveled to and attended the mediation and conferred with

counsel regarding settlement negotiations. (ECF No. 147.1: Setareh Decl., ¶ 72; ECF No. 147.8: Declaration of Dale Wilson ¶ 7.) He undertook to prosecute the cases despite the risk of a cost judgment against him, and despite the potential risk that prospective employers would hold it against him. (ECF No. 147.8: Declaration of Dale Wilson ¶ 8.) The requested enhancement award is reasonable and should be approved.

VI. CONCLUSION

Plaintiff negotiated a settlement that resolves claims and recovers money for 1,300 class members. Notice was successfully completed. No Class Members have chosen to opt out, and no Class Members have filed an objection to the settlement. This confirms that the settlement is fair and reasonable, especially given the claims and the potential defenses to them and to class certification. Plaintiff asks the Court to grant final approval of the settlement and adopt the proposed order submitted herewith.

Respectfully submitted,

Dated: June 17, 2019

SETAREH LAW GROUP

By: */s/ Shaun Setareh*
Shaun Setareh
Thomas Segal

Attorneys for Plaintiff

PROOF OF SERVICE

I am a citizen of the United States and am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 315 South Beverly Drive, Suite 315 Beverly Hills, CA 90212.

On June 17, 2019, I served the foregoing documents described as:

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

in this action by transmitting a true copy thereof enclosed in a sealed envelope addressed as follows:

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[X] BY CM/ECF NOTICE OF ELECTRONIC FILING

I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules. I declare under penalty of perjury under the laws of the United States of America that I am employed in the office of a member of the bar of this court at whose direction the service was made.

[X] FEDERAL I declare under penalty of perjury under the laws of the United States of America that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 17, 2019, at Beverly Hills, California.

JUANITA FERNANDEZ